IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.631 OF 2006

In

WRIT PETITION (L) NO.1527 OF 2006

Sunil Seth & Anr. : Appellants

(Orig.Resp.Nos.3 & 6)

V/s.

Niranjan D. Woody & Ors. : Respondents

(Orig.Petr. & Orig. Resp. Nos.1, 2, 4, 5 and 7)

...

Dr.Virendra Tulzapurkar, senior counsel, with Mr.Kevic Setalvad and Mr.D.J.Kakalia i/b. M/s.Mulla & Mulla & Craigie Blunt & Caroe for the appellants.

Mr.Aspi Chinoy, senior counsel, with Mr.D.D.Madon, Mr.Umesh Shetty and Ms S.D'Souza i/b. M/s.Umesh Shetty & Co., for respondent No.1.

Mr.F.E.D'vitre with Mr.N.N.Bhadrashete for respondent Nos.2 to 4.

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CORAM : R.M.LODHA & S.A.BOBDE,JJ.

DATE : SEPTEMBER 4, 2006.

ORAL ORDER (Per R.M.Lodha, J.)

1. We heard Dr.Virendra Tulzapurkar, senior counsel, for the appellants for sometime and considered his submissions in the context of rule 107 of the Maharashtra Co-operative Societies Rules, 1961.

2. Rule 107 provides for procedure for attachment and sale of property under section 156.

3. To the extent rule 107 is relevant, we reproduce it as it is:-

> **"107. Procedure for attachment and sale of property under section 156**.--(1) A creditor holding a decree requiring the provisions of section 156 to be applied or Society to which--
>
> (a) any amount is due under a decree or order of a Civil Court obtained by the Society;
>
> (b) any amount is due under a decision, award or order of the Registrar, Arbitrator, Liquidator or Tribunals;
>
> (c) any sum is awarded by way of costs under the Act;
>
> (d) any amount is due under a certificate granted by the Registrar to the assets of the society;
>
> (e) any amount is due under a certificate granted by the Registrar under sub-section (1) or (2) of section 101 or under sub-section (1) of section 137 together with interest, if any, due on such amount or sum and the costs of process by the attachment and sale or by sale without attachment of the property of the person against whom such decree, decision, award or order has been obtained or passed, shall apply to the Recovery Officer within whose jurisdiction the debtor resides or the property of the debtor is situated. In the case of a society, a copy of the resolution of the Committee of the society authorising any of its members to make and sign the application on its behalf, shall accompany the application.
>
> Provided that, no such application shall be

necessary in respect of a certificate given under sub-section (1) and (2) of section 101 of the awards or orders referred to in rule 84.

(2) Every such application shall be made in the form specified by the Registrar and shall be signed by the applicant and shall be accompanied [by deposit of such amounts if any, as may be specified by the Registrar to cover the cost of process. The scales for such cost of process shall be fixed by the Registrar from time to time, by a general or special order under such scales, the fee for issuing any notice shall not exceed Rs.2 and the bhatta to be paid to any person serving any notice shall not exceed Rs.5 per day, and the deposit for other costs of process shall not exceed the expenditure likely to be incurred for recovering the amount".] The applicant may indicate whether he wishes to proceed against the immovable property mortgaged it the applicant of other immovable property or to secure the attachment of movable property.

(3) On receipt of such application, or when the Registrar is proceeding under rule 84, the Recovery Officer shall verify the correctness and genuineness of the particulars set forth in the application with the records, if any, in the office of the Registrar and prepare a demand notice in writing in duplicate in the form specified by the Registrar, setting forth the name of the defaulter and the amount due and forward it to the Sale Officer.

(4) .....
(5) .....
(6) .....
(7) .....
(8) .....
(9) .....

(10) Immovable property shall not be sold in execution of a decree unless such property has been previously attached:

Provided that where the decree has been obtained on the basis of a mortgage of such property it shall not be necessary to attach it.

(11) In the attachment and sale or sale without attachment of immovable property, the following rules shall be observed:-

(a) .....
(b) .....
(c) .....
(d) .....

(e) Proclamation of sale shall be published by affixing a notice in the office of the Recovery Officer and the taluka office at least thirty days before the date fixed for the sale and also by beat of drum in the village (on two consecutive days previous to the date of sale and on the day of sale prior to the commencement of the sale). Such proclamation shall, where attachment is required before sale, be made after the attachment has been effected. Notice shall also be given to the applicant and the defaulter. The proclamation shall state the time and place of sale and specify as fairly and accurately as possible,--

(i) the property to be sold,

(ii) any encumbrance to which the property is liable.

(iii) the amount for the recovery of which sale is ordered, and

(iv) every other matter which the Sale Officer considers material for a purchaser to know in order to judge the nature and value of the property.

(f) When any immovable property is sold under these rules, the sale shall be subject to the prior encumbrances on the property, if any. The applicant shall when the amount for the realisation of which the sale is held exceeds Rs.100 furnish to the Sale Officer within such time as may fixed by him or by the Recovery Officer, an encumbrance certificate from the Registration Department for the period of not less than twelve years prior to the date of attachment of the property sought to be sold, or in cases falling under the proviso to sub-rule (10), prior to the date of the application for execution. The time for production of the

encumbrance certificate may be extended at the discretion of the Sale Officer or the Recovery Officer, as the case may be. The sale shall be by public auction to the highest bidder:

Provided that, it shall be open to the Sale Officer to decline to accept the highest bid where the price offered appears to be unduly low or for other adequate reason:

Provided further that, the Recovery Officer or the Sale Officer may, in his discretion adjourn the sale to a specified day and hour, recording his reason for such adjournment. Where a sale is so adjourned for a longer period than seven days, a fresh proclamation under clause (e) shall be made, unless the defaulter consents to waive it.

The sale shall be held after the expiry of not less than thirty days calculated from the date on which notice of the proclamation was affixed in the office of the Recovery Officer. The time and place of sale shall be fixed by the Recovery Officer and the place of sale shall be the village where the property to be sold is situated or such adjoining prominent place of public resort as may be fixed by the Recovery Officer:

Provided that, in case where an encumbrance certificate is not obtainable owing to the destruction of the connected records, an affidavit from the village Talathi or corresponding officer in regard to the encumbrances known to him supported by a certificate from the Registration Department that the encumbrance certificate cannot be granted owing to the destruction of the connected records, shall be accepted in place of an encumbrance certificate.

(g) A sum of money equal to 15 per cent of the price of the immovable property shall be deposited by the purchaser in the hands of the Sale Officer at the time of the purchase, and in default of such deposit, the property shall forthwith be re-sold:

Provided that, where the applicant is the purchaser and is entitled to set off the purchase money under clause (k) the Sale Officer shall dispense with the requirements

of this clause;

(h) The remainder of the purchase money and the amount required for the general stamp for the sale certificate shall be paid within fifteen days from the date of sale:

Provided that, the time for payment of the cost of the stamp may, for good and sufficient reasons, be extended at the discretion the Recovery Officer upto thirty days from the date of sale:

Provided further that, in calculating the amounts to be paid under this clause, the purchaser shall have the advantage of any set off to which he may be entitled under clause (k).

(i) In default of payment within the period mentioned in the last preceding clause, the deposit may, if the Recovery Officer thinks fit, after defraying the expenses of the sale, be forfeited to the State Government and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may subsequently be sold.

(j) Every resale of immovable property in default of payment of the amounts mentioned in clause (h) within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale.

(k) Where an applicant purchases the property, the purchase money and the amount due on the decree shall be set off against one another, and the Sale Officer shall enter up satisfaction of the decree in whole or in part accordingly.

(12) Where prior to the date fixed for a sale, the defaulter or any person acting on his behalf or any person claiming an interest in the property sought to be sold tenders payment of the full amount due together with interest, bhatta and other expenses incurred in bringing the property to sale, including the expenses of attachment, if any, the Sale Officer shall forthwith release the property after cancelling, where the property has been

attached, the order of attachment.

(13)(i) Where the immovable property has been sold by the Sale Officer, any person either owning such property of holding any interest therein by virtue of a title acquired before such sale may apply to have the sale set aside on his depositing with the Recovery Officer,--

(a) for payment to the purchaser a sum equal to 5 per cent of the purchase money, and

(b) for payment to the applicant, the amount of arrears specified in the proclamation of sale as that for the recovery of which the sale was ordered together with interest thereon and the expenses of attachment, if any, and sale and other costs due in respect of such amount, less amount which may since the date of such proclamation have been received by the applicant.

(ii) If such deposit and application are made within thirty days from the date of sale, the Recovery Officer shall pass an order setting aside the sale and shall repay to the purchaser, the purchase money so far as it has been deposited, together with the 5 per cent deposited by the applicant:

Provided that, if more persons than one have made deposit and application under this sub-rule, the application of the first depositor to the officer authorised to set aside the sale, shall be accepted.

(iii) If a person applies under sub-rule (14) to set aside the sale of immovable property, he shall not be entitled to make an application under this sub-rule.

(14)(i) At any time within thirty days from the date of the sale of immovable property, the applicant or any person entitled to share in a rateable distribution of the assets or whose interests are affected by the sale, may apply to the Recovery Officer to set aside the sale on the ground of a material irregularity or mistake or fraud in publishing or conducting it:

Provided that, no sale shall be set aside on

> the ground of irregularity or fraud unless the Recovery Officer is satisfied that the applicant has sustained substantial injury by reason of such irregularity, mistake or fraud.
>
> (ii) if the application be allowed, the Recovery Officer shall set aside the sale and may direct a fresh one,
>
> (iii) On the expiration of thirty days from the date of sale, if no application to have the sale set aside is made or if such application has been made and rejected, the Recovery Officer shall make an order confirming the sale:
>
> Provided that, if he shall have reason to believe that the sale ought to be set aside notwithstanding that no such application has been made or on grounds other than those alleged in any application which has been made and rejected, he may after recording his reason in writing, set aside the sale,
>
> (iv) Whenever the sale of any immovable property is not so confirmed or is set aside the deposit or the purchase money, as the case may be, shall be returned to the purchaser.
>
> (v) After the confirmation of any such sale, the Recovery Officer shall grant a certificate of sale bearing his seal and signature of the purchaser, and such certificate shall state the property sold and the name of the purchaser."
>
> (Emphasis supplied)

4. Dr.Virendra Tulzapurkar, senior counsel for the appellants, strenuously urged that the expression "at the time of the purchase" in clause (g) and the expression "from the date of sale" in clause (h) have to be read as ‘date of confirmation of sale’.

5. The submission is wholly fallacious. It will be seen

that clause (e) of sub-rule (11) provides that proclamation of sale shall be published by affixing a notice in the office of the Recovery Officer and the taluka office at least thirty days before the date fixed for the sale and also by beat of drum in the village (on two consecutive days previous to the date of sale and on the day of sale prior to the commencement of the sale). The date of sale obviously referred to in clause (e) is nothing but date of auction. The word "sale" has been losely used by the rule makers in clauses (e) and (h) for the date of auction. This is fortified by the fact that in clause (f), it is provided that the sale shall be held after the expiry of not less than 30 days calculated from the date on which notice of the proclamation was affixed in the office of the Recovery Officer. The expression "at the time of the purchase" in clause (g) also means ‘at the time of the sale’. The expression "at the time of the purchase" seems to have been used in the context of sale in clause (g) on the deposit of 15 per cent of the price of the immovable property by the purchaser. The expression "at the time of the purchase" means at the time of sale i.e. at the time of auction which is further fortified by the fact that if 15 per cent of the price of the immovable property is not deposited by the purchaser at the time of the auction, the Sale Officer has to proceed for re-sale of the property forthwith. The aspect of confirmation of sale only arises after 100

per cent of the price of the immovable property has been deposited by the purchaser; 15 per cent of the price at the time the highest bid is knocked down in auction and 85 per cent within 15 days from the date of knocking down the bid in the auction. The expression "confirmation of sale" cannot be imported in clauses (g) and (h) of sub-rule (11), as canvassed by the senior counsel for the appellants.

6. In the present case, admittedly, the date of auction was 14.11.2005. It is not in dispute that the appellants failed to deposit 15% of the price of the immovable property at the time of purchase i.e. when the highest bid was knocked down in favour of the appellants. He also did not deposit the remainder of the purchase price i.e. 85 per cent of the purchase price within 15 days from 14.11.2005.

7. For all these reasons, we find that consideration of the matter by the learned Judge does not suffer from any legal infirmity.

8. The impugned judgement does not warrant interference in appeal.

9. Appeal is dismissed in limine.

Sd/-

R.M. LODHA, J.

Sd/-

S.A. BOBDE, J.